



LABOUR LEGISLATION AS AN OBSTACLE TO MORE SUCCESSFUL OPERATION OF ECONOMY



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Contents

Introduction	7
Labor relations models	9
Serbian labor legislation.....	12
European processes	14
Basic weak points of labor law in Serbia	18
Employment	18
Personal income.....	25
Disciplinary accountability	28
Dismissal	29
Extended application of collective agreements	32
Instead of a conclusion	34

LABOUR LEGISLATION AS A SUPPORT TO MORE SUCCESSFUL OPERATION OF ECONOMY

The present analysis aims first to give a brief outline of the major weak points of domestic labor legislation from the point of view of modern labor law and the needs of economic life in Serbia, which, following a debate in the Serbian Association of Managers, would serve as a basis for formulating recommendations for amendments to labor legislation. Attention has also been paid to some extent to international and European labor standards, constituting a framework which inevitably affects labor legislation in Serbia.

INTRODUCTION

The regulation of labor relations has a significant bearing on a company's operation: it affects employer-employee relations, the organization of work, the volume of administrative work in a company, the number of effective working hours, employee salaries and other benefits and, generally, each company's operating costs.

In many countries, Serbia included, the legislators' intent to create a balance between employees and employers by regulating labor relations is proclaimed, i.e. their intent to ensure the protection of employee interests, but in such a way as not to jeopardize the economy's operation and efficiency. The question is, however, whether such intent is feasible and whether it is brought about in real life, since broadening employee rights usually has a negative bearing on a company's operation in one way or another.

(Excessive) overprotection of employees, i.e. rigid labor legislation can also significantly make difficult a company's adaptation to changed business circumstances: labor legislation acceptable in good times can prove not to be so acceptable in a crisis,

when the operation method should be altered, expenses cut, the volume of production very often reduced, and even the workforce sometimes, and when due to labor legislation the employers' hands are tied or they are faced with a prohibitively high cost of adapting. Similarly, rigid labor legislation significantly makes difficult the necessary constant adaptation of a company to competition and a highly dynamic environment of open economies, causing domestic companies to suffer losses in competitiveness vis-à-vis foreign competitors.

Regrettably, labor legislation is considerably affected also by political factors, i.e. the parties' efforts to boost their respective political ratings by broadening employee rights. Consequently, the issue of regulation being changed so as to benefit voters, who are employees, is raised from time to time, without paying due attention to other actors in the process and the ultimate economic effects of such proposals.

Both the media as well as the public usually favor employees, which results in support to broader legal protection of employees at the expense of freedom of bargaining over labor relations. In the process, employers are more often than not seen as the workers' exploiters who need to be kept in check rather than as those organizing economic activity, providing employment and having their own rights as well as understandable interests. In the text below, we shall try to shed some light on labor legislation in a more balanced way, while in the section dealing with its specific weak points, priority will be given to those primarily posing either a work, administrative or financial burden to a company's efficient operation.

Beyond the domain of labor legislation, there are numerous serious problems facing the economy and needing to be addressed as well, such as broader problems related to the abuse of sick leave, the system of registering and cancelling the registration of employees, the practice applied by courts in labor disputes etc., but we have not tackled them on this occasion, limiting our efforts to the Labor Law instead.

LABOUR RELATIONS MODELS

The classical concept of differences in labor relations has resulted in their being classified into two models, namely, the liberal and the protective. The United States (US), Canada, Australia, New Zealand, (and even) Great Britain and Ireland belong to the liberal camp, whereas the majority of European countries belong to the protective camp. The main characteristics of these models can be summed up as follows:

The liberal (Anglo-Saxon) model:

- easier employment and dismissal procedures, since it is believed that each party has the right to conclude an employment contract freely and to terminate it at will (e.g. in the US); this right has recently been restricted by a discrimination ban;
- shorter employment in one company, which naturally follows from easier dismissal procedures, making a given job available to another employee;
- moderate unemployment benefits in order to stimulate an unemployed person to search for a job;
- trade unions are not particularly strong, since they are not given a special role under legislation as in the case of the protective model;
- labor relations are quite conflicting, but usually within a company, since the model is based on the market principle rather than social mediation;
- bargaining over salaries is primarily decentralized, i.e. it is primarily done at company level, which means that a company's trade union and the employer bargain over the issue;
- income inequality is more pronounced, since the labor market mainly freely decides on salaries depending on labor supply and demand and the employees' contribution to their company's success;
- younger and older generations are in an equal position;

- unemployment rate is usually lower, since easier dismissal procedures encourage employers to hire new employees, while relatively low benefits in the event of unemployment encourage unemployed persons to search for jobs.

The protective (continental) model:

- legal protection against dismissal, since dismissal is only possible if there is a valid reason for it, while a dismissed employee is often entitled to severance pay paid by the employer;
- longer service with the same company, since the dismissal frequency is low, specifically if compared to the liberal model;
- more generous unemployment benefits, since under the welfare state concept efforts are made to prevent a decline in the living standards of those who have lost their jobs;
- strong trade unions as a consequence of both the tradition of unionization as well as labor legislation providing for their formally important role in collective bargaining;
- more co-operative labor relations due to developed social dialogue in which state representatives, employer associations and trade unions try to avoid employer-employee conflicts by finding negotiated solutions;
- collective bargaining over salaries is more centralized, i.e. it is mainly conducted at national/industry level, applying to the companies concerned;
- more balanced income distribution as a result of the concern by (some) key players in centralized collective bargaining over balanced salaries and of the elimination of the labor market impact;
- older generations fare better than younger generations, since they are protected by inflexibility, whereas younger persons mainly account for the unemployed contingent;
- unemployment rate is usually higher, because dismissal constitutes a difficult and usually expensive process and, as a result, there is a more modest demand for new employees

(employers are reluctant to hire new employees since they know that it will be hard to dismiss them if their services are no longer needed).

Elsewhere in the world, there are no clear-cut models so that labor legislation varies depending on a political (democratic/non-democratic) system, the state authorities' capacity, tradition, emulation of the above models etc.

The difference between the liberal and the protective model lies in a different point of view. The liberal model gives priority to economic logics, because its primary concern is to ensure the good functioning of a company at micro level and of the overall economy at macro level. When business circumstances deteriorate, it enables companies to adjust relatively simply either the employment level or salary levels, within the institutional framework based on free bargaining between employees and employers. The central idea is that healthy companies equal a healthy economy, which eventually (i.e. in the long run) leads to high employment and good salaries.

On the other hand, the protective model gives priority to the social aspect, i.e. the employees' security and living standards even when economic circumstances deteriorate. Even then, the companies' and the economy's simple way of adapting by changing the employment and salary levels is not accepted, but by ensuring the security of jobs, i.e. by making it hard to dismiss employees and reduce their salaries, companies and the economy as a whole are left to shoulder the entire burden of adaptation. This ensures a high security of employees as well as companies with a redundant workforce and economies with a higher number of unemployed persons than in the liberal model. The latter is the result of the employers' reluctance to hire new employees when times are good because they know that it will be hard to dismiss them when the economic situation takes a turn for the worse.

SERBIAN LABOUR LEGISLATION¹

In the first few years of transition, namely, in the 2001-2005 period, the reform of labor relations was undertaken in Serbia, liberalizing in part labor legislation compared to its pre-reform model, in force up to that point and adopted under different circumstances in 1996. However, free contractual relations between employees and employers were not introduced under this labor relations reform, which basically emulated the method of regulation customary in the European Union (EU), which means a large number of solutions implying the inflexibility of labor relations and the labor market. The main idea of this method of regulation of labor relations is to protect employees from the risks inevitably inherent to economic life, i.e. to transfer these risks to the employer only, with all financial and other consequences.² Its main features include a considerable level of protection of employees, a highly formalized character and a high complexity of labor relations procedures, the important role of trade unions imposed by law, and the extension of validity of the old General Collective Agreement, which was adopted before the reform and which extremely broadened employee rights and protection etc.

The main features of the Serbian Labor Law and related activities can be summed up as follows:

- the Labor Law is restrictive; this inflexibility hampers the economy in adapting to the environment's dynamic change and leads to lower employment due to the employers' tendency to refrain from it;

1 The paper entitled *Radno zakonodavstvo kao podrška društveno odgovornom preduzetništvu (Labour Legislation as a Support to Socially Responsible Entrepreneurship)* by B. Lubarda, Lj. Kovacevic, Mimeo, 2012, was used to review Serbian labour legislation

2 For further details, see *Four Years of Transition in Serbia* by a group of authors, CLDS, 2005, Chapter 10

- the Law is characterized by extreme paternalism, which due to the Law's extensive regulation of all sorts of issues makes it impossible for the employer and an employee to make arrangements even when this is in their mutual interests;
- chaotic collective bargaining system at national and industry levels, including even non-representative participants and relying extensively on the so-called extended application that is unacceptable, in which way the idea of free collective bargaining is violated, while collective bargaining itself is turned into its very contradiction;
- such a labor relations system:
 - discourages employers from hiring new employees, which coupled with a slow pace of transition and the Government's inappropriate response to the economic crisis has led to highly negative employment and unemployment trends;
 - favors currently employed persons over the unemployed, i.e. it favors predominantly older generations over predominantly younger generations through the dismissal and employment of a small number of people, which leads to the creation of a stable company workforce that hardly ever changes;
 - encourages non-compliance with the law, since life inevitably tries to avoid unnecessary barriers, so that violations of the law are a common occurrence due to both the resolution of real problems (e.g. employees sign undated, blank letters or resignation kept by employers) as well as the lack of necessary labor legislation expertise in small firms; this in turn leads to frequent trials for breaches of prescribed procedures, which results in the violation of the rule of law and economic losses due to the courts' evident bias in favor of employees³;

3 It is believed that one of the reasons for the above bias lies in the fact that, in Serbia, the costs of court proceedings are awarded to the party that has lost a lawsuit, which would be too heavy a burden to many employees, as well as the fact that it is far easier to collect the costs from employers.

- leads to non-standard forms of work arrangements (fixed-term employment, temporary agency work, casual employment, temporary service contract etc.), aiming to solve the issue of a company's regular workforce in an easier way and by cutting costs;
- encourages transition to grey economy, without any work contract, to avoid restrictive provisions of labor legislation;
- often leads to unnecessary conflicts in a company etc.

It is noteworthy that, in late 2011, an attempt at a highly limited "*flexibilisation*" of labor legislation in Serbia, provided for by the Government's draft amendments to the Labor Law, was rejected by trade unions, which prompted the Government to relinquish its own proposal. As we have already seen, the EU has been going through a phase of more liberal changes over the entire past decade and, consequently, Serbia is lagging behind the EU, adhering to the old concept, which is gradually being abandoned even by the EU itself.

EUROPEAN PROCESSES

High unemployment, amounting to about 10% in most of the countries in the 1980's and the 1990's, has prompted the EU member states to launch the reform of labor legislation, announced already in the Lisbon Strategy of 2000. Modern-day challenges in the sphere of entrepreneurship and employment (and the European integration process) are linked to profound changes in work and life due to the globalization process, development of new technologies like information and communication technology (Internet), demographic changes caused by population ageing and the change in the family structure, strong segmentation of labor markets, especially due to the employees' greater share in small and medium-sized employers, as well as a higher number of employees working under non-standard forms of work arrangements (*outsiders*). These challenges lead to the transformation of the social model, to which two documents of the European Commission including

its *Green Paper on modernizing labor law to meet the challenges of the 21st century* (2006) and its communication entitled *Towards Common Principles of Flexicurity* (2007) in particular contribute. The Commission inaugurated the concept of *flexicurity* as an alternative to Europe's traditional social model.

The concept seeks to replace the security of employment based on protective labor legislation with a solution which will result in greater flexibility in the labor market and the organization of work and higher employability and adaptability of workers due to their greater capacity to find and keep jobs thanks to their professional skills which are constantly improved, which represents the concept of lifelong learning. Broadening the possibility of using non-standard types of employment, ranging from fixed-term employment, via part-time work to casual employment, temporary agency work and job sharing, constitutes a major aspect of flexibilisation of labor relations. The reform of labor legislation should lead to greater adaptability of employees and employers (companies) in the context of goals of full employment, higher labor productivity and social cohesion. The workers' adaptability through action at the Community and member state level can be brought about by better education and professional training of the workforce.⁴

Labor legislation (and autonomous labor law), among other things, aims to support socially responsible entrepreneurship. This is reflected in the modern concept of flexicurity, aiming both to encourage entrepreneurship and new (productive) employment (*more and better jobs*, which is the Lisbon goal), including in particular support to and flexible solutions for newly-established employers (entrepreneurs), as well as to ensure that solutions provided for by labor legislation pose no obstacle to the establishment and operation of small and medium-sized businesses. Consequently, support to entrepreneurship is reflected in the following: a) concept of employment and active employment policy measures; b) flexible contractual arrangements for employment and other forms of work

4 *Green Paper on Modernising Labour Law*, European Commission, 2006, p. 3.

arrangements; c) solutions provided for by individual labor law; d) solutions provided for by collective labor law; e) solutions in the sphere of social security.

Labor legislation reforms have not been uniformly designed for the entire EU but have instead been undertaken individually by every country (or not undertaken at all). However, all those that have been enacted into law are aimed at liberalizing labor relations, i.e. at reducing job security and generosity of social benefits granted to the unemployed, in order to achieve greater labor market flexibility,⁵ under the label of flexicurity.

An overview of adopted/ratified conventions of the International Labor Organization (ILO)⁶ by countries is an illustrative manifestation of individual countries' labor regulation policy. This is so due to the fact that the ratification of a convention demonstrates a country's readiness and obligation to apply its content to its national legislation, whereas its non-adoption signals a country's intention to keep its freedom of action in a given area of labor relations or even not to define a given issue under its legislation at all. Consequently, it can be said in principle that the countries which have ratified a large number of conventions have more strictly regulated labor legislation, while those which have ratified fewer conventions are more liberal.

5 Consequently, in Germany, the following changes were made in the 2003-2005 period: a longer unemployment benefit eligibility period was introduced, the benefit duration period was shortened for older workers, other benefits were reduced, for the first time there was a requirement that unemployed persons must search for a new job themselves, sanctions were introduced for persons turning down job offers, private companies were enlisted to search for jobs for the unemployed, employment agencies were reorganised, while temporary employment agencies were deregulated, see M. Burda and J. Hunt: *What Explains the German Labour Market Miracle in the Great Recession?*, CERP, August 2011

6 ILO is a United Nations (UN) agency which promotes and supervises the implementation of international labour standards. Its members include states and employer and employee organisations, while its guidance method is based on conventions on specific issues, adopted (or not) by member states which later translate them into their respective national legislation.

The overview of the ratification of ILO conventions by primarily European as well as a number of non-European countries reveals the following: the group of countries heading the list includes France (102 ratified conventions), Norway (91), Bulgaria (84), the Netherlands (83) and Poland (81). It is followed by the group of countries with 60-79 ratified conventions, which includes Germany, Sweden, Great Britain, Belgium, Slovenia, the Slovak Republic, Portugal, the Czech Republic and **Serbia** (71). The group of countries with 40-59 ratified conventions includes Switzerland, Australia, Romania, India, Russia and Croatia. The group of countries with the lowest number of ratified conventions (under 40) includes Canada and Estonia (32), South Korea (27), Singapore and China (22), Vietnam (17) and the US (14).

As one can see, the EU member states i.e. the states promoting the so-called protective continental model of highly-regulated labor relations are at the top of the list. There is one non-member state among them, namely Serbia, which has ratified a large number of ILO conventions in a wish to get closer to the EU as soon as possible, without dwelling too much upon its own interests and labor market conditions.

The bottom of the list is mainly reserved for European countries which are not EU members and non-European countries, which have more liberal labor relations but which often also register speedier economic growth or a higher GDP than the European average. The US has ratified the lowest number of conventions, only 14 of them, and they do not even include some considered to be fundamental (e.g. the one on freedom of association and collective bargaining or the one on elimination of discrimination).

It is noteworthy that there are 189 ILO conventions all in all, which means that only one country in the world (France) has ratified more than half of them. This proves that the status of ILO conventions is neither particularly high in the world, nor are they so widely applied as could be concluded from the bulk of reference material on labor legislation in Serbia.

BASIC WEAK POINTS OF LABOUR LAW IN SERBIA

This section gives an overview of the basic weak points of the Labor Law, which we believe make difficult the functioning of companies and jeopardize the business environment in Serbia. Still, we have not questioned here the current concept of labor legislation and fundamental employee rights but have instead tried to identify those major issues which represent the weak points but which can nevertheless be solved within the existing labor relations model. Addressing these shortcomings would to a certain extent lead to more flexible solutions, but it would primarily help eliminate some obvious omissions in the existing Labor Law, which do not necessarily have anything to do with the selection of the labor relations model.

Employment

In contrast to the standard form of employment (permanent full-time employment), some non-standard forms including a fixed-term/part-time employment contract, a job share contract, a temporary agency contract, a casual work contract, a telework contract, an on-call contract etc. are becoming increasingly widespread. The cause of the expansion of these forms of employment lies in both better adaptation of employment to labor processes (more flexible forms in times of insecurity and speedy changes in the economic environment) as well as the avoidance of numerous restrictions of the existing legislation in the case of employment, dismissal etc. Present in many countries (Germany, the Netherlands etc.), the process constitutes a major element of new employment system.

Fixed-term employment

The solution currently provided for by the domestic Labor Law stipulates that fixed-term employment cannot exceed a period of 12

months (Article 37, Paragraph 1) and can be entered into in the case of seasonal jobs, project-based work and increased volume of work over a specific period of time. The above concept is highly inflexible and violates the freedom of employer-employee arrangements, its idea being to direct employers to hire more people through permanent employment, which is a more favorable option for an employee. However, the above goal is usually not achieved, since the alternatives to fixed-term employment include illicit work (no employment at all) as well as non-hiring of employees, leading to higher unemployment than in the case of fixed-term employment, or the transfer of business activities to grey economy etc. On the other hand, dynamic changes in the economic environment, accompanied by growing insecurity, economic crises, fluctuations in the demand for a company's products and services, the need to cut expenses so that a company could operate with success etc. often require considerable and speedy workforce adaptation, which cannot be secured efficiently under standard permanent employment contracts.

The said Labor Law concept is quite inflexible from the point of view of comparative law solutions. Namely, fixed-term employment is allowed in the EU member states regardless of reasons for it but, as a rule, its duration is limited to 24 or 36 months, while employee security is guaranteed by limiting the number of successive fixed-term employment contracts, usually to a maximum of three successive contracts with one employee (the next contract would have to be a permanent employment contract). Consequently, *de lege ferenda*, domestic law ought to envisage a longer period, e.g. two or three years, without the obligation to cite reasons for it, limiting, however, the maximum number of successive fixed-term employment contracts with one employee (e.g. to a maximum of three contracts in a reference period). This is suggested also by Europe's framework collective agreement for temporary employees, requesting the employer to inform temporary employees about their chances of becoming employed on a permanent basis.

To back newly-established employers encountering initial difficulties related to their market survival (competition), it would

be good to envisage in their case the possibility of concluding fixed-term employment contracts even for a three- or four-year period, as provided for by e.g. recent German legislation, in order to encourage entrepreneurship and new employment in this flexible way as well.

Job share contract

Domestic positive law makes no mention of this specific form of work contract so that the Labor Law should be amended in this respect. Job sharing is a specific method of hiring a team (pair) of employees, who share a single position on a part-time basis as some sort of partners, cooperating in doing their job, making autonomous decisions on their work schedule and enjoying the employer's support in developing team cooperation in the fulfillment of job duties. The division of work can be initiated by employees themselves or can be introduced at the employer's initiative. In both cases, the employer has an additional role of creating a balance in meeting the needs and fulfilling the ambitions of the employees sharing a job.

This type of contract can be considered to round off the idea of part-time work i.e. to be a solution to some problems resulting from this other type of contract. Namely, a part-time contract is more preferable for many persons whose family and other circumstances (children, health, elderly parents etc.) or preference for spare time and the activities which it enables make full-time work an unattractive option. However, when the employer hires an employee part time (e.g. half time), it is occasionally faced with the problem of covering the remaining working hours since it is not easy to find another employee of adequate profile and with adequate skills willing to work half time as well. In such a situation, the "first" employee may be able to find a partner capable of working in a pair and ready to do so i.e. to split working hours, regardless of the fact whether this is his/her spouse or a stranger he/she finds through his/her channels. In this way, two goals can be achieved in a complementary manner: the employees' goal to work shorter working hours and the employer's goal not to feel the negative

consequences of this arrangement i.e. to have an employee full time.

The positive sides of job sharing include the following: (1) better adapted work and spare time to a person's preferences, (2) greater work satisfaction due to less stress and less strenuous work, (3) the employer has a chance to hire a skilled, experienced employee it could not hire full time, (4) the employer has a chance to hire complementary profiles in one job thus increasing job efficiency, (5) being less under burden, job-share employees are usually more focused at work and more diligent than those working full time, which benefits the employer, (6) if one employee is absent for any reason, the other is present to fulfill at least a part of the most important tasks etc.

In addition to each employee getting a lower salary, the negative sides of job sharing include the following: (1) the sensitivity of the issue of shared responsibility between the partners, since it is sometimes hard to say who should take the credit/blame for something, (2) the partners can (rightly or wrongly) feel that they contribute more than just one of them would if he/she worked full time and be dissatisfied on account of it, (3) it can sometimes lead to confusion in communication, especially if an executive post is shared, (4) there are additional administrative costs, double training etc.

Like other forms of non-standard work contracts, this type of contract, which first started to spread in the US in the 1970's, has been experiencing expansion in the industrialized world over the past few decades.

Telework contract

According to the European model, telework can be defined as "a form of organizing and/or performing work using information technology, in the context of an employment contract, where the work, which could also be performed at the employer's premises,

is carried out away from those premises on a regular basis".⁷ This type of work is usually done at an employee's home, although it can be performed in other places as well, ranging from coffee shops, via internet cafés to rented premises, its major feature being that an employee is not located at the same place as his/her colleagues, i.e. the people he/she does a specific job with. Naturally, telework has been rendered possible by modern communication technology and in particular the Internet, telephony, video equipment etc.

Telework has numerous advantages over the standard form of organization of work. For the employer, this means a chance to lower considerably the cost of labor and in particular the cost of office space and transport of employees. The system also enables the employer to hire highly skilled professionals it could not hire otherwise because they live too far.

On the other hand, telework improves the employees' chances of employment without their having to move to other parts of a country or a big city or to commute to work in big cities, which is a time-consuming activity. Telework is in particular a good solution for families whose active-age members find it hard or impossible to leave home (children, elderly parents), as well as disabled persons who can work without having to go through a strenuous and risky ordeal of having to travel to work every day. The system by all means enables employees to better organize and use their time, as well as to achieve greater independence in the organization, planning and performance of work.

In industrialized countries, this form of work arrangement has been registering rapid expansion in the past few decades. Consequently, in 2010, the number of people working permanently or occasionally at home amounted to 3.7 million in Great Britain.⁸

Domestic labor legislation does not directly define telework, but there is no obstacle to its being organized in keeping with the

7 European Framework Agreement on Telework concluded by ETUC, UNICE/UEAPME and CEEP on 16 July 2002, Item 2, Paragraph 1

8 See <http://www.bbc.co.uk/news/magazine-11879241>

Labor Law provisions governing performance of jobs outside the employer's premises (so-called work at home). Still, such a solution seems to be insufficient, since telework can be organized in several different ways, i.e. it does not have to be done at an employee's home only, but also at the premises owned by third parties (e.g. work in the so-called telecottages/telecentres, the opening of which could be especially suitable for domestic entrepreneurs at local self-government level, i.e. it could be done under the auspices of local entrepreneur associations). Consequently, potential application of the regulations on work at home to teleworkers will depend on a specific type of telework, which makes it necessary to define telework directly under Labor Law provisions and/or separate collective agreements (concluded for an industry/a local self-government). The regulation of some issues under collective agreements can even be an advantage due to easier respect for the specific features of some forms of this type of work.

There is a similar form of (often remote) workforce hiring, known under the English term of *outsourcing*. It implies the process of contracting a company's business functions to someone else to enable it to focus on its most important operations and reduce its expenses by transferring subsidiary activities to someone else. However, the essential nature of this arrangement suggests that this is not a form of direct workforce hiring or employment but usually a commercial contract for the provision of specific services between two companies and, consequently, outsourcing will not be dealt with by this paper.

Temporary agency contract

Serbia's Labor Law makes no mention of a type of work arrangement which is becoming increasingly popular in European countries.⁹ Namely, businesses (agencies) are set up to employ workers who then work for another business, on a temporary basis

⁹ See *Temporary agency work in an enlarged European Union*, European Foundation for the Improvement of Living and Working Conditions, 2006

(due to increased volume of work, to replace an absent employee etc.), whereby the work contract is concluded by the two businesses (rather than the worker doing the job). In other words, a private agency, interested in making a profit, recruits a worker solely to "hire out" his/her work temporarily to other businesses that need it, so that there is no work contract (or labor relation) between the user business and the worker. On the other hand, this work arrangement, i.e. a contract between a business (agency) and a worker can be concluded for a fixed term as well as an indefinite period of time.¹⁰

The triangle comprising an agency, a business and a worker is usually characterized by the following relations: (a) the agency has an extensive list of workers looking for jobs, (2) the agency has studied their qualifications and skills, (3) the employer needing temporary workers contacts the agency and contracts the number and structure of workers, their salary per hour and everything else, (4) the agency sends the required workers to work at the employer's, (5) the agency pays the workers the agreed rate per hour, and (6) the employer pays the agency the agreed sum for the workers' services. In this way, these agencies secure flexibility for both a worker as well as the employer. Some provide unskilled workers only, whereas others provide specialized, highly skilled experts.

For the employer, this arrangement can have numerous positive effects such as finding the required workers quickly, which is not possible if it searches for them itself, avoiding the standard form of regular employment in situations when workers are needed only temporarily, a chance to avoid paying some expenses such as health insurance, paid annual leave etc.

These agencies are attractive for workers, too, because it is easier to get a job in this way than to look for it oneself; temporary agency work can open the door to permanent employment, since some employers use this option as probation when they want to hire workers on a permanent basis; a worker is aware that, unlike state agencies, these agencies will try hard to find him/her a job,

10 In Germany, employees are hired by agencies for an indefinite period of time, with all the usual benefits (old-age pension, disability and health insurance etc.)

motivated by their own interest of making a profit per each worker etc.

The existing Labor Law provisions on temporary assignment (Article 174) do not define this sphere properly and, consequently, should be completely amended.

Personal income

The Labor Law overregulates the system of setting salaries and other personal income, violating the freedom of employer-employee arrangements, making impossible more modern remuneration systems and causing administrative difficulties to employers. Let us have a look at some of its weak points.

Salary non-differentiation

The Labor Law makes it impossible for the employer to award an employee a salary higher than that received by other staff doing the same job, even if a given employee works much better than the others and if his/her contribution to the company's success is bigger. The Labor Law achieves this as follows:

Systematization: The Labor Law stipulates that a company should pass a by-law defining jobs, their content (description), relevant professional requirements, i.e. that it should adopt a job systematization; this provision is by all means unnecessary since it is in the interests of every company to have such one document for its own organizational reasons (Article 24); however, the reason why Serbian legislators make this stipulation is the legal principle that all employees should receive equal pay for equal work, while equal work is equated with the same job, so that it is practically impossible to raise a person's salary permanently without raising the salaries of others holding the same job. This is stipulated in Article 104 of the Labor Law: "All employees shall be granted the equal salary for the same work or the work of the same value performed for the employer. Work of the same value is defined as the work for which

the same educational level, same working ability, responsibility as well as physical and intellectual work are needed”.

Statutory salary structure. To tighten the ban on differentiation, the Labor Law lays down the salary structure (Article 105), while the employer has to define elements for the calculation and payment of a base salary and a performance-based salary under another by-law. In other words, once jobs and requisite professional skills have been defined under a job systematization, each job is linked to a relevant base salary and a method of calculation of a performance-based salary, so that the employer has to invent another job, which has to be included in the job systematization, when wishing to award someone a salary that is different (bigger or smaller) than that received by others. If not, salary differentiation will not be in keeping with the law.

Complex salary calculation system

Salary calculation is further complicated by determining the performance-based salary share on a monthly basis, which is quite unnecessary for most of employees and real situations in business companies. Also, the legal stipulation that a salary based on an employee's contribution to the employer's business success should represent a separate additional mandatory salary category is nothing but an unnecessary complication of the salary system in Serbia. Since incentive remuneration for good work is in the interests of both the employer as well as an employee, operating costs should not be increased nor the natural freedom of employer-employee arrangements violated by excessive red tapes.

Employee compensation

Employee compensation can be in different forms: the basic form includes a salary (base salary and a performance-based bonus), but there is also non-salary compensation (benefits-in-kind, cost coverage and some bonuses). The latter can vary greatly, ranging from accommodation cost coverage and the right to use

a company car, via an additional pension scheme and additional health insurance, to recreation and annual leave cost coverage, provision of meals at work, additional education etc.

In Serbia, a large number of compensation modalities are formally included in a salary and, as a result, are subject to rigid tax treatment (payroll tax and social contributions), which is unnecessary since it is not for the Labor Law to define the taxation of specific components of employee remuneration. Namely, it would be more logical if the Labor Law did not specify in detail salary components and, consequently, the taxation of specific components, leaving it instead to tax legislation to deal with the tax aspect. This would enable the exclusion of some potential benefits, such as the use of company cars and accommodation cost coverage, from a salary and their more favorable tax treatment.

Salary compensation during leave

Salary compensation during differently motivated leave (Articles 114-116) must be based on the average salary in the preceding three-month period, which means that a salary based on performance, overtime, night shifts and shift work, work on public holidays, company-paid meal, holiday cash grants, annual bonus etc. must also be included. This is not a good solution because it does not make any sense that the compensation base of an employee currently not working should include a performance-based salary as if his/her output were outstanding. This is more so in a situation when high one-off bonus payments (e.g. annual remuneration) were made in the preceding three months, distorting the picture of an employee's current salary. The same goes for all other forms of occasional compensation causing also considerable deviation of a three-month salary from a standard salary. Such a solution leads to significant differences in salary compensation of otherwise equal employees, depending on when they are due to receive it. It is far more just that a base salary without the salary segment calculated on other grounds should constitute the compensation base, which could then be increased by stored-up labor.

Disciplinary accountability

A major weakness of the Labor Law is the lack of clear provisions on disciplinary accountability i.e. on the sanctioning of employees for the violation of their duties and failure to observe labor discipline. Admittedly, there are elaborate provisions on dismissal based on the above grounds. Disciplinary accountability is touched on in the legal provisions on temporary suspension from work without pay (Article 170), but the sanction is symbolic and therefore ineffective: the maximum sanction implies three-day suspension without pay.

Other provisions on disciplinary accountability simply do not exist in the Labor Law, which is interpreted in different ways. There are some who believe that the Law clearly indicates that, under our law, employees are accountable for the violation of their duties and that employers can define the issue of violation of duties and labor discipline either independently or together with the relevant trade union. Another interpretation, contrary to the previous, is based on the position that the Labor Law does not at all define or even mention disciplinary accountability, measures and proceedings, nor does it envisage that the matter be dealt with in more detail under the employer's by-law. Such a stand is primarily affirmed by views held by the ministry in charge of labor affairs as well as decisions taken by the Constitutional Court of the Republic of Serbia, which, assessing the legality of provisions of by-laws defining the issue of employee disciplinary accountability, took the stand that disciplinary accountability, proceedings, bodies and measures could not be defined under by-laws, which was a common practice of many domestic employers (labor rule books), i.e. social partners (collective agreements).¹¹

11 Decision of the Constitutional Court of the Republic of Serbia, IU No. 213/2004 of 23 June 2005 (Official Gazette of the RoS, No. 68/05); Decision of the Constitutional Court of the Republic of Serbia, IU No. 494/2004 of 14 July 2005 (Official Gazette of the RoS, No. 68/2005).

The Constitutional Court's position means that, in Serbia, employee disciplinary accountability is limited to dismissal only,¹² quite needlessly making it impossible to introduce an offence of lesser gravity than that deserving dismissal, and prohibiting other sanctions (e.g. temporary salary deductions) which would be in proportion to the gravity of a given offence.

Such a solution does not make any sense either from the point of view of ensuring labor discipline or from the point of view of comparative law solutions. In view of the fact that the issue of disciplinary accountability is traditionally dealt with by labor legislation in terms of both substantive as well as formal law, the existing concept of disciplinary accountability in domestic labor legislation should be reconsidered. The Labor Law should either (1) define the issue of disciplinary accountability in more detail or (2) make it mandatory for employers to regulate the issue themselves under their respective by-laws.

Dismissal

We shall not analyze the transition to the liberal concept of dismissal at this point, since it would require declaring ineffective ILO Convention No. 158 as well as the Revised European Social Charter, ratified by our state in the capacity of Council of Europe member state. Nevertheless, the Labor Law has some weak points even within this concept.

Complex procedures

One of the problems concerns the complex procedures envisaged for some types of dismissal, making employers reluctant to dismiss staff even when legal grounds for the move evidently exist. Let us mention just a few of them:

- in the case of *abuse of sick leave*, before dismissal, the

¹² We shall disregard for the time being three-day suspension from work as a symbolic sanction.

employer has to prove in a formal and complex way (by establishing an employee's fitness for work in the relevant health care institution) that sick leave has indeed been abused; consequently, dismissal is automatically wrongful if the abuse has not been established in the statutory way, even when it evidently exists; a better solution would be for the employer to be entitled to exercise the right to dismissal also by investigating itself the abuse, on condition that the employer provides valid evidence of it in potential court proceedings,

- situation is similar in the case of *a labor-related offence*: under the stand by the Supreme Court of Cassation,¹³ dismissal on these grounds is possible only once a ruling to this effect becomes final, which usually means in a few years and which automatically means that dismissal before the ruling's finality is wrongful, even if it is evident that an offence exists; in this case, too, a better solution would be for the employer to be entitled to exercise the right to dismissal also by investigating itself the nature of an offence, while the (il)legality of dismissal would be definitively assessed according to a final ruling.

Consequences of wrongful dismissal

In Article 191, the Labor Law sets the framework for damage compensation if a court delivers a final ruling that an employee has suffered wrongful dismissal. In addition to reinstating the employee, the employer has to compensate him/her in the amount of the salary and other emoluments he/she has lost, unpaid social contributions included.

Even though the principle of damage compensation for wrongful dismissal makes sense, the question remains of where to set the limits to that compensation. For, it is not only the employer that is responsible for the number of months during which an employee does not work following his/her dismissal, but also the court itself due to the slow pace of its proceedings (lasting usually

13 Legal interpretation by the Civil Division of Serbia's Supreme Court of Cassation of 30 November 2004

several years). In other words, it is not fair that the employer should also compensate the damage which it did not cause itself but which was caused by someone else instead. Consequently, limiting the employer's obligation by setting the maximum number of monthly salaries which can be awarded would by all means make sense as a way of the employer's protection from the slow pace of the courts' proceedings, but also as a stimulus to courts to process labor disputes of this kind faster.

Severance pay

Severance pay is an important element in the event of termination of employment due to both retirement as well as dismissal by the employer when there is no longer a need for a specific job or when the volume of work has decreased. In Serbia, it goes without saying that an employee is entitled to severance pay, as if it were an irrevocably acquired right or a civilizational achievement. However, it is not quite certain that the right to severance pay is based on strong reasons. Firstly, the right to severance pay in the event of retirement is quite evidently debatable, because there is no valid reason why the employer should improve a former employee's financial position once he/she retires. Secondly, even though the countries with a legal/quasi legal obligation (laid down in collective agreements) to provide severance pay are far more numerous in the world, there are many countries including Belgium, Ireland, Germany, Norway, Sweden and Switzerland where the provision of severance pay in the event of dismissal is not a legal obligation and where the social security of an employee once he/she loses his/her job is entirely ensured through unemployment insurance. Moreover, ILO's *Termination of Employment Convention No. 158* is not binding to the countries which have ratified it in the sense that they have to include the obligation of provision of severance pay, leaving it to them instead to choose between severance pay and unemployment insurance as well as other state programs.

The second problem related to severance pay in Serbia concerns its levels: in the event of retirement it amounts to three monthly salaries, whereas in the event of dismissal due to reduced

volume of work it amounts to at least one third of a monthly salary for each of the first ten years of service and one fourth of a monthly salary for each subsequent year. In the countries coping with the second wave of the crisis, severance pay is reduced, which is believed to be a stimulus to employment due to lower potential dismissal costs. This is the course taken by Spain and Portugal in 2012.¹⁴

The third problem in domestic labor law concerns the provision of Article 158, Paragraph 2 of the Labor Law stipulating that severance pay be provided for every year of an employee's total years of service rather than the years of service he/she has accumulated with a given employer. This (1) enables an employee to collect severance pay several times in different companies for the same years of service and (2) makes it obligatory for the employer to provide severance pay for the years of service an employee has not accumulated with it.

Extended application of collective agreements

In Serbia, the collective bargaining system is mainly modeled after the European standards but nevertheless has some weak points in terms of both its regulation as well as its application. The major weak point is that the competent minister can decide to extend the application of one collective agreement so as to include employers that are not members of the employer association which has signed a given collective agreement (Article 257). This was indeed done in early 2009, for example, only to be annulled soon after.¹⁵

14 See <http://www.businessweek.com/news/2012-02-13/spain-cuts-severance-pay-on-new-open-ended-job-contracts.html>; <http://www.portugaldailyview.com/whats-new/labour-law-severance-pay-to-get-severely-severed>

15 At the very start of the economic crisis in 2009, an annex to the General Collective Agreement was signed between trade unions and the Union of Employers (which should represent the employers' interests) providing for a 20% salary rise. Governed by his great wish to enable all in Serbia to experience the benefits of this excellent idea of how to prevent the negative effects of the crisis, the Minister decided that the application of this annex should be extended to all employees. A few days later, the Government annulled his document.

The reasons against this provision are numerous and convincing:

- it violates the freedom of collective bargaining, guaranteed under ILO conventions, because it extends the agreement reached by two parties, namely, a trade union and what is by all means a minority employer association, to those that have not taken part in the bargaining, i.e. employers that are members of other associations or are not members of any associations and that represent the great majority;
- it brings legal insecurity to business operation, since employers do not know if and when the minister will exercise his/her right mentioned above and regulate many crucial elements of business operation (e.g. employee salaries), which directly and vitally affect a company's financial results;
- it introduces political motives to collective bargaining, since the competent minister can be governed by the interests of the Government and the ruling coalition when considering the extended application; in this way, politics unnecessarily finds its way into economic life causing negative effects and starting to affect private sector operations directly;
- it prompts representative employer and employee organizations to study the effect which collective bargaining has on them as organizations rather than as employees or employers; the Union of Employers of Serbia has thus noticed that its membership is dwindling due to its acceptance of collective agreements which only refer to the employers that have joined the Union and, consequently, it has now taken a stand on the matter, informing the Ministry that it will no longer sign collective agreements if it is not immediately stipulated that they have extended application;¹⁶ the Union hopes that, in this way, the reason why employers have withdrawn from it (to avoid the application of a collective agreement) will be eliminated;

16 *Analiza primene Opšteg kolektivnog ugovora 2008-2011 (Analysis of the Application of the General Collective Agreement 2008-2011)*, Union of Employers, 2011, p. 36

- it extends the application to all firms within one system of collective agreements that is not in line with the principles of a modern market economy (e.g. salary levels are set based on the coefficient and the minimum cost of labor rather than modern performance measurement systems etc.);
- it extends the application of a collective agreement made through the participation of an employer association with a highly debatable representativeness, which cannot be taken to represent a major segment of Serbia's economy. For, the Union of Employers rallies small businessmen (shop owners and similar), so that their share in employment or added value in Serbia is insignificant. Consequently, the Union does not represent a relevant economic force nor does it include a relevant number of employees, so that essentially it cannot represent Serbia's employers.

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Such a politicized system of extended application of collective agreements, without the involvement of employers representing the dominant segment of the economy, has turned into its very contradiction, whereby one side seeks to recruit votes, the other is trying to fulfill its petty personal interests and yet another one to meet the interests of the stratum it represents, while the interests of the country's economic recovery and development are neglected in the process.

INSTEAD OF A CONCLUSION

As in many other European countries, both the general as well as the political public in Serbia labors under some misconceptions about the labor market and labor legislation, namely, the misconceptions that employers will do the following:

- stop hiring new employees if not under pressure from or encouraged by the state,
- immediately start dismissing employees if the state and its

legislation do not prevent dismissals, and

- reduce employee salaries if there is no legal protection of employees or if there are no collective agreements.

This is by no means true since it is in the employers' best interests:

- to achieve the highest level of production possible and, consequently, the highest employment possible, because they will increase their profit in this way,
- not to dismiss good workers, whose training always costs, so that they want to keep them in their firms in the long term,
- to pay well good employees, in keeping with market conditions, because they will find a job in other firms if this is not the case.

The present labor legislation has shifted the balance between rights and responsibilities in favor of employees and to the disadvantage of employers. In the long term, the result is lower employment and a less efficient economy. If Serbia wants to embark on the road to a real economic recovery, one of the reform areas should also include labor legislation. The EU has already taken steps to this effect.

